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HARVARD

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THE SUPREMACY OF THE JUDICIARY UNDER THE CONSTITUTION OF THE UNITED STATES, AND UNDER THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA.

WHEN a division of governmental powers, into the three categories of legislative, executive, and judicial, is definitely made by a written constitution, in the manner in which such a division of them is made by the Constitution of the United States, and by the Constitution of the Commonwealth of Australia, and the exercise of the powers embraced under each of those categories is explicitly vested in a distinct and separate governmental organ, as is done by each of the above-named constitutions, the three separate organs so created are usually declared by jurists and writers on constitutional law to be co-ordinate in authority within their respective spheres. Both of the above-named constitutions establish a federal system of government of the same distinctive type, in respect of the distribution of legislative powers between the federal legislature and the legislatures of the several states; and neither of them explicitly assigns any supremacy or predominance to any one of the three separate organs of government which each of them has created. But Professor Dicey, in his book, "The Law of the Constitution," says: "Federalism, lastly, means legalism — the predominancy of the judiciary in the constitution — the prevalence of a spirit of legality among the people"[1]

[1] 4th ed. p. 164.

And he proceeds to add, with reference to the United States, "no separate legislature throughout the land is more than a subordinate law-making body, capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench, therefore, can and must determine the limits of the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of Judges is not only the guardian, but also the master of the constitution."

This language of Professor Dicey's may be taken as a substantially correct description of the position conceded to the federal judiciary in the United States by all competent exponents of American constitutional law at the present time. But it is well known that during the first three or four decades after the adoption of the Constitution, the supremacy which Professor Dicey ascribes as a necessary attribute to the judiciary in a federal system of government was emphatically denied to the judiciary in the United States by several able American jurists, who asserted that the power to declare an Act of Congress invalid, because contrary to the Constitution, was not inherent in the judicial department of the government, and that nothing short of an express grant of such a power by the Constitution could justify any attempt to exercise it. The first case in which an Act of Congress was declared invalid by the Supreme Court of the United States was the well known case of Marbury *v.* Madison,[1] which was decided in the year 1803. In referring to the judgment pronounced by Chief Justice Marshall in this famous case, the late Professor Thayer, in his admirable biographical monograph on Marshall, says:

"The reasoning is mainly that of Hamilton in his short essay of a few years before in the Federalist. The short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of McCulloch *v.* Maryland,[2] Cohens *v.* Virginia,[3] and other great cases; and this treatment is much to be regretted. Absolutely settled as the doctrine is to-day, and sound as it is, when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations — such too as affect to-day the proper administration of this extremely important power — which are not touched by Marshall, and which must have commanded his attention if the subject had been deeply considered and fully expounded according to his later method. His reasoning

[1] 1 Cranch 137. [2] 4 Wheat. 316. [3] 6 Wheat. 264.

does not answer the difficulties that troubled Swift, afterwards Chief Justice of Connecticut, and Gibson, afterwards Chief Justice of Pennsylvania, and many other strong, learned, and thoughtful men; not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of disregarding the act of a co-ordinate department, and the action of a federal court in dealing thus with the legislation of the local states; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other. . . . So far as any necessary conclusion is concerned, it might fairly have been said with us, as it is said in Europe, that the real question in all these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal. Could Marshall have had to deal with this great question, in answer to Chief Justice Gibson's powerful opinion in Eakin *v.* Raub,[1] in 1825, instead of deciding it without being helped or hindered by any adverse argument at all, as he did, we should have had a far higher exhibition of his powers than the case now affords."

The substance of Chief Justice Gibson's dissenting opinion in Eakin *v.* Raub is contained in the following extracts from it:

"I begin, then, by observing that in this country the powers of the judiciary are divisible into those that are political and those that are purely civil. Every power by which one organ of the government is enabled to control another, or to exert influence over its acts, is a political power. The political powers of the judiciary are derived from certain peculiar provisions in the Constitution of the United States, of which hereafter; and they are derived by direct grant from the common fountain of all political power. On the other hand, its civil are its ordinary and appropriate powers; being part of its essence, and existing independently of any supposed grant in the constitution. But where the government exists by virtue of a written constitution, the judiciary does not necessarily derive, from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the composition of our social institutions as to be inseparable from them, and to be, in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the common law, except where these are expressly, or by necessary implication, abridged or enlarged in the act of adoption; and that such act is a written instrument cannot vary its consequences or construction. . . .

[1] 12 Serg. & Rawle 330.

Now what are the powers of the judiciary at common law? They are those that necessarily arise out of its immediate business; and they are, therefore, commensurable only with the administration of distributive justice without extending to anything of a political cast whatever. . . . The constitution of Pennsylvania contains no express grant of political powers to the judiciary. But to establish a grant by implication the constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way. This is conceded. But it is a fallacy to suppose that they come into collision before the judiciary. . . . The constitution and the right of the legislature to pass the act may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the constitution are we to look for this proud pre-eminence? . . . It is the business of the judiciary to interpret the laws, not to scan the authority of the law giver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. So that to affirm that the judiciary has a right to judge of the existence of such a collision, is to take for granted the very thing to be proved. . . . Now, as the judiciary is not constituted for that purpose, it must derive whatever authority of the sort it may possess from the reasonableness and fitness of the thing. But, in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws, when made, involves only the construction of the laws themselves, it follows that the construction of the constitution in this particular belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank has never been pretended, although it has been said to be co-ordinate. It is not easy, however, to comprehend how the power which gives the law to all the rest can be of no more than equal rank with one which receives it, and is answerable to the former for the observance of its statutes. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise. The very definition of law, which is said to be 'a rule of civil conduct prescribed by the supreme power of the state,' shows the intrinsic superiority of the legislature. It may be said that the power of the legislature also is limited by prescribed rules. It is so. But it is nevertheless the power of the people, and sovereign so far as it extends. It cannot be said that the judiciary is co-ordinate merely because it is established by the constitution.

If that were sufficient, sheriffs, registers of wills, and recorders of deeds, would be so too. [That is, under the constitution of Pennsylvania.] Within the pale of their authority the acts of these officers will have the power of the people for their support; but no one will pretend they are of equal dignity with the acts of the legislature. Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions; and the legislative organ is superior to every other, inasmuch as the power to will and command is essentially superior to the power to act and to obey. It does not follow, then, that every organ created by special provision in the constitution is of equal rank. Both the executive, strictly as such, and the judiciary, are subordinate; and an act of superior power ought, one would think, to rest on something more solid than implication."

When the foregoing opinion was cited before its author, twenty years after its delivery (1845), he said to the counsel who cited it:

"I have changed my opinion for two reasons. The late convention by their silence sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case." [1]

The second reason given by Chief Justice Gibson for changing his opinion is a concise but pregnant and effectual reply to his elaborate argument on the opposite side twenty years earlier. If a written constitution, which imposes limits on the powers of all the organs of government which derive their existence from its provisions, is to be preserved in its integrity, as a fundamental law controlling the action of the governmental organs which it has created, there must be power lodged somewhere to restrain any infringement of it by any one of those organs, as soon as any person who is entitled to the benefit of its provisions chooses to seek redress for any detriment he has suffered by such an infringement of it. A written law for the violation of which there does not exist a positive and certain method of redress available to any person who is damnified by a violation of it, is a nullity, or is, at the most, only a precept of conduct which those to whom it is addressed may follow or disregard as they think fit; and if infringements of a written constitution by the legislature are to remain without correction or redress, until the legislature retraces its steps, the constitution ceases for an indefinite period of time to exist in its original integrity; and the particular provision of it which has been violated is, during the same indefinite period

[1] Norris *v.* Clymer, 2 Pa. St. 277, 281.

of time, practically repealed. If this result of an infringement of a written constitution by the legislature is to be avoided, there must be a tribunal to which an immediate appeal for redress can be made by any person who is damnified by the action of the legislature; and the tribunal which affords redress in such case necessarily exercises judicial power, because it declares what is and what is not law, and applies what it declares to be law to the facts submitted to its investigation. In searching for a tribunal which may be *prima facie* supposed to have authority under the constitution to afford redress in such a case, the person seeking the redress will naturally and inevitably select the judiciary, because it is explicitly invested by the constitution with judicial power; and his appeal to the judiciary for redress cannot be refused without an assertion of the proposition that the redress he claims is not within the ambit of the judicial power. Chief Justice Gibson attempted to support that proposition by the argument that to declare an act of the legislature invalid was an exercise of political and not judicial power, and that the judiciary could not exercise any political function by virtue of the powers inherent in it under the common law. Let us examine this argument.

If it be conceded that to declare an act of the legislature invalid is a political and not a judicial function, it may, nevertheless, be a function which the judiciary may find it necessary to perform in particular cases, as inseparable from a full and adequate performance of its truly judicial functions. The decisions of the judiciary in such cases are political only in their consequences, and not in their primary and intrinsic character as declarations of the contents of the law. And if a court performs a political function when it declares an act of the legislature invalid, because unauthorized by the constitution, it also performs a political function when it declares that an act of the executive department of the government invalid for the same reason; and this has frequently been done by the courts of common law in England in regard to acts of the Crown, in whom all executive power is primarily vested by the unwritten constitution of that country. Examples of the exercise of this function by the courts of common law in England are found in the Case of Proclamations in the year 1610,[1] the Bankers' Lease in 1690,[2] Wilkes *v.* Wood in 1763,[3] and Leach *v.* Money in 1765.[4] But under the unwritten constitution of Eng-

[1] 12 Coke's Reports 74.
[2] 1 Freeman 331.
[3] 19 State Trials 1153.
[4] 3 Burrows 1692.

land the Crown is not only the primary depositary of all executive power. It is also invested with large legislative powers in regard to colonies and dependencies acquired by conquest or treaty; and the English courts of common law have repeatedly declared the limits of those powers, and have in several cases declared an attempted act of legislation by the Crown, or by its local representative, to be invalid. The leading case on this subject is Campbell *v.* Hall.[1] In that case the Court of King's Bench pronounced a proclamation of the King which purported to levy duties on exports from the Island of Granada to be void, because the Crown had by a previous proclamation delegated its legislative power in the island to a local assembly. In the later case of Cameron *v.* Kyte,[2] the Judicial Committee of the Privy Council declared invalid an attempted exercise of legislative power by the Governor of the Colony of Berbice in the name of the Crown.

In referring to the cases in the reign of James I., in which the Court of King's Bench, under the presidency of Chief Justice Coke, decided political and constitutional questions, the late Professor Gardiner observes in his History of England:[3]

"Bacon's dislike of admitting the judges to be the supreme arbiters on political questions arose originally from his profound conviction that such questions could only be properly treated of by those who were possessed of political knowledge and experience. He felt, truly enough, that the most intimate acquaintance with statutes and precedents was insufficient to enable a man to decide upon state affairs; and if he had ever been inclined to forget it, the example of Coke was constantly before his eyes as a proof that no amount of legal knowledge will ever constitute a statesman. Nor was this a consideration of small importance. As the relations between James and his Parliament then stood, the judge who decided upon the law which assigned limits to each could not avoid usurping the functions of a statesman. He not only declared how far the existing law applied to the facts of the case, but fixed the constitution of the country for the future. It was true that theoretically the decisions of the judges were liable at any time to be reversed by Act of Parliament; but the day was far distant when it would be possible to obtain the joint assent of the Crown and the Parliament to any act affecting the powers of either. For the present, the judges, if they succeeded in maintaining their independence, would have in their hands the supreme control over the Constitution. They would be able, without rendering account to any one, to restrain or extend the powers of

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[1] 1 Cowper 204.
[2] 3 Knapp, P. C. C. 332.
[3] Vol. 2, p. 261.

the Crown for an indefinite period. In 1606 they had, by a decision from the bench, assigned to the King the right of levying Impositions, which, in spite of all opposition, he retained for no less than thirty-five years. If it pleased them, they might deprive him, in the same way, of rights which he considered to be essential to his government."

It would be difficult to suggest a supremacy of the judiciary under any system of government more emphatic in its character than that which is described in the foregoing extract; and the political character and consequences of the power exercised by the judges of the courts of common law in England at the time to which the writer of it refers are beyond all dispute. The same historian then proceeds to describe the position occupied by the judiciary in England since the time when Parliament acquired supreme control of the government of the country, and in that connection he observes:

"The victory of the Parliament has, indeed, thrown the supreme political power into other hands than those in which Bacon would have placed it; but it is not one of the least happy results of that victory that it has now become possible to exercise a control over the judges without sacrificing their independence. It is Parliament which decides what the Constitution shall be, and having this power in its hands, it is by no means inclined to interfere with the judges in declaring, in the exercise of the proper duties of their office, what the Constitution is at any given moment."

The description here given of the position occupied by the courts of law in England, with the consent of Parliament at the present time, in relation to questions of constitutional law, is equally applicable to the judiciary in the United States, and to the judiciary in the Commonwealth of Australia, under the constitution from which it in each case derives its existence. When the courts in England declare any executive or legislative act of the Crown to be illegal at common law, and not authorized by any statute, they declare that the Constitution does not empower the Crown to do it. In like manner when the judiciary in the United States, or in Australia, pronounces an Act of Congress, or an Act of Parliament of the Commonwealth, to be invalid, it declares that the constitution from which Congress, or the Parliament of the Commonwealth, derives its existence does not authorize the attempted exercise of legislative power. But in each of the above mentioned cases, whether in England, or in the United States, or in Australia, the judges declare what the constitution says, only, as Gardiner

has phrased it, "in the exercise of the proper duties of their office," or, in other words, only in connection with or incidental to the adequate performance of judicial functions.

One of the most pertinent illustrations of a declaration by an English court of the limited extent of a particular power inherent in a political body under the British Constitution is the famous case of Stockdale *v.* Hansard.[1] In the opening part of his judgment in that case, Lord Denman, C. J., said, in reference to the first plea of the defendant, that it contained a proposition "wholly untenable and abhorrent to the first principles of the Constitution of England." And the judgment of Coleridge, J., in the same case contains numerous references to the limitations placed by the British Constitution upon the powers vested by it in the separate governmental bodies which exist under it. The court decided in that case that the House of Commons, by ordering a report to be printed could not, under the then existing law, legalize the publication of libellous matter. That declaration of the limitation imposed by the Constitution upon the inherent powers of the House of Commons was made by the court in the exercise of a purely judicial function in relation to a claim for damages made by one private person against another private person. The House of Commons is not in itself the legislative organ of government under the British Constitution, but it is a co-ordinate branch of the supreme legislative organ of the Constitution; and it seems impossible to suggest any reason why the judgment in Stockdale *v.* Hansard should not have been the same as it was, if the House of Commons had been the sole legislative Chamber possessing original legislative power in the British Empire, so long as assent and publication by the Crown were necessary to the validity of an alleged law.

In the two later cases of Bradlaugh *v.* Erskine[2] and Bradlaugh *v.* Gosset,[3] the Court of Queen's Bench decided that the House of Commons is not subject to the control of the law courts in matters relating to its own internal procedure, and that what is said and done within its walls cannot be inquired into elsewhere. This is also a declaration of a portion of the law of the British Constitution relating to the House of Commons, and it was made in the exercise of the purely judicial function of deciding upon the validity of

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[1] 9 A. & E. 1.
[2] 47 L. T. Rep. 618.
[3] L. R. 12 Q. B. D. 271.

a demurrer in an action for damages for an assault upon the plaintiff.

It therefore appears that there is not any solid foundation for the assertion that the judicial power exercisable by the courts in England under the common law does not include any jurisdiction to decide questions which may require for their determination a declaration of the limits or extent of the powers possessed by a political body under the Constitution. And if there is not any solid foundation for that assertion, the argument founded upon it, that the judiciary under a written constitution cannot, without a specific grant of power for that purpose, exercise a jurisdiction which is political in its character or consequences, is found to be without the historical support which the assertion was supposed to give to it.

The essential and ultimate question involved in the controversy about the competence of the judiciary under a written constitution to declare invalid an act of the legislature is, what is the essential nature of judicial power? The distinction between legislative and judicial power was concisely and clearly expressed by the Earl of Chatham in his speech on the expulsion of Wilkes from the House of Commons, when he said "*legem facere* and *legem dicere* are powers clearly distinguishable from each other in the nature of things." It has always been the distinctive and characteristic function of the judge, in every community in which the distinction between judicial and executive and legislative functions has been recognized in the structure of the government, to declare what the law is in reference to any particular set of facts submitted to him for investigation as a basis of any alleged legal right or liability. The power which is vested in the judge to enable him to perform this function necessarily includes the power to declare that a particular law alleged by a litigant to be applicable to a particular set of facts is not applicable to them. It also necessarily includes the power to declare that an alleged law which a litigant asserts to be applicable to his case does not exist, if in fact there is not any such law in existence. This is the particular form of the exercise of judicial power which is performed by the judiciary under a written constitution when it declares an alleged law to be invalid because beyond the competency of the legislative body that has attempted to enact it. That such an alleged law is invalid, so long as the constitution which it infringes is recognized as a law of superior obligation, has never been

denied by those who have disputed the competency of the judiciary to declare its invalidity; but they have argued that without a specific grant of power to the judiciary to determine the question of the validity of an alleged law, it is determinable by that authority alone by which the constitution was established. The tribunal which those who deny the competency of the judiciary assert to be the only one which has authority to declare such an alleged law invalid, is composed of the persons who elect the members of the legislature, and its decision, in any case in which an appeal was made to it, would be pronounced and recorded by the legislature by a repeal of the invalid law. But neither the composition of the tribunal appointed to determine a particular question, nor the mode of procedure adopted by it, can alter the essential nature of the question to be determined; and a declaration by any tribunal, whatever may be its composition or procedure, that an alleged law is invalid, because enacted in contravention of a superior law, is an exercise of judicial power, because it is an authoritative declaration of the contents of the superior law. If it be argued that a repeal of an unconstitutional law by the legislature itself in obedience to a mandate from the electors would not be an exercise of judicial power, because the repeal would not be made for the purpose of determining the legal rights or liabilities of particular persons in relation to a particular set of facts which has previously arisen; the obvious reply is that it is almost impossible to suppose that the electors would be stirred to demand the repeal of an unconstitutional act of the legislature under which no question of the legal rights or liabilities of some or all of the electors under the constitution had arisen; and the only thing required to make the repeal of the invalid law an exercise of judicial power in the fullest sense of the word would be a provision in the act of repeal for extending appropriate redress to any persons who had been damnified by the repealed legislation.

The Constitution of the United States provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It also declares that "this Constitution and the laws of the United States made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." But if the power to declare that an alleged law of Congress is invalid when it has been enacted in contravention of the Constitution

of the United States has not been conferred upon the federal judiciary by the Constitution, then "the judicial power of the United States" does not include the power to declare in particular cases a particular portion of "the supreme law of the land." The Constitution enumerates the several classes of cases to which the judicial power of the United States shall extend, and, therefore, by necessary implication, excludes all other classes of cases; but it does not give any restrictive definition of the judicial power of the United States which precludes the tribunals in which it is vested from declaring the whole of the law applicable to any case submitted to them. Nor does the Constitution impose any restriction or limitation of any kind upon the extent of the relief or redress to be given by the tribunals in which the judicial power is vested in any case to which the power extends. But the denial of the competency of the federal judiciary to inquire into the validity of an Act of Congress involves the proposition that the Constitution supposes that cases might arise under it which would be within the jurisdiction of the Supreme Court, and which, therefore, might properly be submitted to that tribunal for adjudication, and at the same time would be exempt from the application of that part of "the supreme law of the land" which is contained in the Constitution.

The substance of most of the foregoing observations upon the nature of judicial power, and upon the consequences of a denial of the competency of the judiciary to inquire into the validity of an Act of Congress, is contained in Chief Justice Marshall's judgment in Marbury *v.* Madison; and the reply which Chief Justice Gibson made to Marshall's argument was as follows:

"But it has been said to be emphatically the business of the judiciary to ascertain and pronounce what the law is; and this necessarily involves a consideration of the Constitution. It does so; but how far? If the judiciary will inquire into anything beside the form of the enactment, where shall it stop? There must be some point of limitation; for no one will pretend that a judge will be justified in calling for election returns, or scrutinizing the qualifications of those who composed the legislature."

This answer seems to have been made in a moment of forgetfulness of the important distinction between the intrinsic character of an accomplished act proceeding from a source having the necessary legal authority to perform it, and the procedure prescribed for accomplishing it. In regard to all questions relating to pro-

cedure and prescribed formalities, the maxim *Omnia presumuntur rite et solemniter esse acta* applies, whenever the evidence necessary to prove the fact of the performance of the act does not carry with it proof of a fatal omission or illegality in the performance of it. The legal presumption of validity may be rebutted in some cases; but there are other cases in which it is irrebuttable, and in which the maxim above quoted is a statement of a definite and final conclusion of law. It is a conclusive and irrebuttable presumption of law that every final judgment of a competent court is correct in both law and fact. *Res judicata pro veritate habetur.* In the case Rex *v.* Carlile,[1] Lord Tenterden, C. J., said: "The authorities are clear that a party cannot be received to aver as error in fact a matter contrary to the record. . . . A record imports such absolute verity that no person against whom it is admissible shall be allowed to aver against it." The original copy of an Act of the British Parliament, or of an Act of the Parliament of the Commonwealth of Australia, which bears the signature of the Crown, or of the Governor-General of the Commonwealth, as the case may be, and the original copy of an Act of Congress which has received the signature of the President, or which is certified in the prescribed manner to have been passed over his veto, are all in the same position as a record of a final judgment of a court of last resort, so far as the presumption of the legality of the procedure by which each of them came into existence is involved. But in the matter of the presumption in favor of the legality of their contents, an Act of Congress and an Act of the Parliament of the Commonwealth of Australia are not in the same position as that of an Act of the British Parliament. In the case of an Act of the British Parliament no inquiry into the legality of its contents is possible because there is not any higher law which it can infringe. But in the case of an Act of Congress, or of an Act of the Parliament of the Commonwealth of Australia, there is a higher law to which it must conform, and the presumption of the legality of its contents is, therefore, rebuttable before whatever tribunal has authority to inquire into the legality of them.

When Chief Justice Gibson announced that he had changed his opinion "from experience of the necessity of the case," he doubtless realized that the only alternative to the supremacy of the judiciary under a federal system of government was the supremacy of the leg-

[1] 2 B. & Ad. 367.

islature, and that the supremacy of the legislature meant the emasculation of the Constitution. In his dissenting opinion in Eakin *v.* Raub, he had conceded a superiority of rank to the legislature, and had declared that "both the executive, strictly as such, and the judiciary are subordinate." This assertion is clearly correct so far as it means that the executive and the judiciary are under a legal obligation to execute and administer all valid acts of the legislature. But this fact demonstrates the necessity of the supremacy of the judiciary as the organ for interpreting a written constitution, because, as Bagehot has well said, "A legislative chamber is greedy and covetous [of governmental power]; it acquires as much, it concedes as little as possible." Under successive encroachments by the legislature the stability of a written constitution would be reduced to a shadow, and the contents of it would be changed with every interpretation the legislature might think fit to put upon it in favor of its own power under it. In countries which have a unitary form of government under a written constitution, like France and Belgium, the effects of infringements of the constitution by the legislature are not so serious, because the legislature in such countries possesses all the primary legislative power exercisable under the constitution, and the limitations imposed upon the legislature by the constitution are mostly of such a character that public opinion and sentiment may be safely relied upon to protest quickly against any violation of them. In Switzerland the provisions made by the constitution for the use of the referendum, and the frequent resort made to it, provide a protection against such successive infringements of the constitution by the federal legislature as would radically change the character of it; but they do not provide that immediate channel of redress which the judiciary in America and in Australia provides for every citizen whose personal or proprietary rights are invaded by unconstitutional legislation.

In the Commonwealth of Australia the question of the competency of the judiciary to inquire into the validity of an Act of the Parliament of the Commonwealth was directly submitted to the Supreme Court of the state of Victoria, in the first year of the existence of the Commonwealth, in the case of Kingston *v.* Gadd.[1] This case arose under the Commonwealth Customs Act, 1901, and was heard and determined by the court in the exercise

[1] 27 Vict. L. R. 417.

of the federal jurisdiction conferred by that act upon the supreme courts of all the states for a limited period in respect of questions arising under it. The defendant alleged that the section of the Commonwealth Customs Act under which he had been made to pay a penalty for a breach of it was *ultra vires* the powers of the Parliament of the Commonwealth under the Constitution of the Commonwealth, and was, therefore, invalid. The counsel for the plaintiff had contended that when there was not any question of a conflict of legislation between a state and the Commonwealth, or any question of encroachment by the Parliament of the Commonwealth upon the legislative domain of the states, the courts will not inquire into the validity of an act of the Parliament of the Commonwealth duly passed and assented to by the Governor-General, and not disallowed by the Crown within the statutory time allowed for that purpose. The court rejected this contention and based its decision on the fifth introductory section of the Commonwealth of Australia Constitution Act, which declares that "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." The court was composed of three judges, each of whom read a written judgment. Mr. Justice Williams said:

"The words 'and all laws made by the Parliament of the Commonwealth under the Constitution' mean 'in pursuance of the Constitution.' If they are not so made they are not binding on this Court, and it is, therefore, our duty to inquire and ascertain whether the actions to which we have been referred, and under which the penalties in this action are sought to be enforced, and in so far as they relate to the specific offences charged, constitute legislation which the Parliament of the Commonwealth has power to impose under or in pursuance of the Constitution."

Mr. Justice Holroyd said:

"At the recent hearing of this action a proposition was advanced by counsel for the plaintiff, which, if I rightly understand it, I hope will not find acceptance with any judge. It is this, that if the Parliament of the Commonwealth makes a law which does not encroach upon the legislative power of any state, no court or judge in any state has the right to declare

that such law was one which the Parliament of the Commonwealth was not authorized by the Constitution to make, or even the right to inquire into the validity of any such law. In my opinion that is not the true construction of Section 5 of the Commonwealth Constitution Act. It is by that section enacted that the Commonwealth Constitution Act itself and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state. *Expressio unius exclusio alterius.* All laws made by the Commonwealth but not made under the Constitution — that is, not made by virtue of the powers conferred upon the Commonwealth by its Constitution — are not binding upon the courts, judges, or people of any state, and ought to be rejected by the courts and judges of every state as invalid whenever any question arises as to their validity."

Mr. Justice Hood said:

"The legislative powers of the Commonwealth Parliament are delegated powers bestowed by the paramount authority, the Parliament of Great Britain. That being so, it seems to me that the authorities quoted in respect to the duties of English courts with regard to English legislation cannot be applied in their full extent in the relations of this Court to the Federal Parliament. A distinction exists which it may not be easy to define, but which is none the less substantial, because the delegated authority must be exercised within the prescribed limits and over the prescribed subjects. The Courts, therefore, before enforcing Commonwealth law ought to investigate and determine whether or not that law is in substance one which there is jurisdiction to make."

These extracts from the judgments of the three judges who composed the court, illustrate their unanimity in the opinion that "the judicial power of the Commonwealth," which is vested by Section 71 of the Constitution of the Commonwealth in the courts therein mentioned, is not restricted in its exercise by the political consequences of any judgment which any of those courts may pronounce in any case in which an interpretation of the Constitution of the Commonwealth is involved. It will also be observed that the extract from the judgment of Mr. Justice Holroyd contains an argument which finds, in the fifth introductory section of the Act of the Imperial Parliament which establishes the Constitution of the Commonwealth, the specific authority which Chief Justice Gibson at one time supposed to be necessary to enable the judiciary under a written constitution to reject an alleged law which had been enacted by the legislature in contravention of the Constitu-

tion. If the maxim *expressio unius exclusio alterius* supplies a correct and safe rule of construction for the interpretation of the section of the Commonwealth of Australia Constitution Act to which Mr. Justice Holroyd applied it, in the case above mentioned, it must be equally applicable to the second section of Article 6 of the Constitution of the United States. The language of each of the two sections is almost identical with that of the other, with the addition of the words "shall be the supreme law of the land" in the Constitution of the United States. The additional words do not make the maxim less applicable to the construction of the section in which they are found; and if the section can be properly read as declaring that any Act of Congress enacted in contravention of any provision of the Constitution shall not be binding on the courts or judges of any states, the whole controversy about the competency of the judiciary to reject any such Act of Congress as void is settled by a direct provision of the Constitution in reference to the matter.

In his biography of Chief Justice Marshall, the late Professor Thayer refers to the position of a President who finds himself in the situation in which President Johnson found himself when the Reconstruction Acts which he had vetoed because he believed them to be unconstitutional were enacted by Congress over his veto; and he asks upon what ground should a President in such a position execute an Act of Congress which he believes to be contrary to the Constitution he has taken an oath to support? He also refers to the position of the House of Representatives when it is required to vote the money necessary to carry out a treaty which it believes to be unconstitutional. And he asks in reference to both cases, "Is the situation necessarily different when a court is asked to enforce a legislative act?" The situation is not necessarily different if the court is not clothed with a power to review an Act of Congress which is not conferred on any other organ of the government. But if the court is clothed with such a power, the situation is not parallel to that of a President who believes an Act of Congress to be unconstitutional. If a President could rightfully refuse to execute an Act of Congress which he believed to be unconstitutional, there does not appear to be any reason why any subordinate officer of the government, who has taken an oath to support the Constitution could not rightfully do likewise. But in any such case in which a subordinate officer refused to perform a duty imposed upon him by an Act of Congress,

an appeal could be made to the courts to compel him to perform it. If the court agreed with the opinion of the recalcitrant officer and declared the act to be unconstitutional, the court would nevertheless exercise a power not vested in the officer, that is to say, the power of determining whether he had been guilty of a breach of law. But the officer had previously attempted to determine that question for himself when he decided not to obey the act. He had therefore attempted to exercise a power not vested in him; and a President does the same thing if he refuses to execute an Act of Congress which he believes to be unconstitutional, but which has not been declared to be invalid by the judiciary. When he obeys the act he does not attempt to determine the question of its validity, or the question whether he is guilty or not of a breach of law in obeying it. He is in the same position as that occupied by every officer of the government who is under a legal obligation to obey the commands of a superior officer. The responsibility for the legality of any command given to the subordinate officer in such a case rests upon the superior officer who gives it; and any person who is damnified by the execution of the command must appeal for redress to the authority, if there is any such, to which the superior officer is responsible, and which is empowered by law to give redress in such cases. Congress is not responsible in any manner whatever to the judiciary for the consequences of unconstitutional legislation. But the judiciary is empowered to extend to every person who is damnified by unconstitutional legislation whatever redress is provided by law for such cases. The President knows this when he executes legislation which he believes to be unconstitutional; and by faithfully executing such legislation in accordance with the will of Congress, he obeys the Constitution by leaving the question of the validity of the legislation to be decided by the tribunals in which the Constitution has vested the power to decide it.

The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power. If governmental power is in any case unlimited, the exercise of it is not subject to any law, and it is therefore impossible that the judiciary, in such circumstances, should have any authority to declare any exercise of it invalid. But if governmental power is in any case limited by a law proceeding from a source superior in political power to the

organ by which such limited governmental power is exercised, the constant and immediate supremacy of that law cannot be maintained without the existence of a separate tribunal which has authority to declare the contents of that law whenever an appeal is made to it to do so in exercise of its proper functions. The courts of law in England have not hesitated to declare acts of the Crown, legislative and executive, invalid, because they were contrary to law, and the Crown is under the law. The law in many of those cases was unwritten, but it was none the less definite law, and the authority of the courts to declare it maintained its supremacy so long as it continued to exist. If, under a written constitution, the powers of the legislative organ of the government are defined and limited, the supremacy of the law which defines and limits those powers cannot be regularly and constantly maintained against attempted infringements of it by the legislature, if there is not a separate tribunal invested with authority to declare that law at the appeal of any person who claims the protection of it. The conception of the supremacy of law above the possession and exercise of governmental power is the peculiar achievement and inheritance of the English-speaking race. But before any conception or ideal of the social or political relations of men can produce practical results, it must be embodied in one or more social or political institutions; and in the supremacy of the judiciary the conception of the supremacy of law has found its appropriate and beneficial application to the legal and political relations of the individual to the state.

A. Inglis Clark.

HOBART, TASMANIA, July, 1903.